

**MEMORANDUM OF AGREEMENT
AMONG
THE U.S. GENERAL SERVICES ADMINISTRATION,
THE NEW YORK STATE HISTORIC PRESERVATION OFFICER,
AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING THE DEVELOPMENT OF A NEW FEDERAL COURTHOUSE IN
BUFFALO, NEW YORK**

WHEREAS, pursuant to Public Law 108-7 (February 20, 2003) Congress authorized the U.S. General Services Administration ("GSA") to acquire property for the construction of a new Federal Courthouse in Buffalo, New York (the "Courthouse"); and

WHEREAS, following a comprehensive search for building sites, GSA has determined that the appropriate site to construct the Courthouse is the block bounded by West Mohawk Street on the north, Delaware Avenue on the east, Niagara Square on the south, Niagara Street on the southwest, and South Elmwood Avenue on the west, in Buffalo, New York (the "Site"); and

WHEREAS, pursuant to Public Law 108-7 (February 20, 2003) and EO 12072 ("Federal Space Management"), Congress authorized GSA to acquire by eminent domain or negotiation the block bounded by Niagara Street, Elmwood Avenue, Mohawk Street, Delaware Avenue, and Niagara Square, including two (2) buildings located at 91 Niagara Street and 120 Delaware Avenue eligible for listing in the National Register of Historic Places (the "National Register"); and

WHEREAS, GSA has determined the undertaking's Area of Potential Effect ("APE"), as defined in 36 C.F.R. § 800.16(d), to be Niagara Square, bounded by Mohawk Street, Franklin Street, Eagle Street, and South Elmwood Avenue, within the locally-designated Joseph Ellicott Historic Preservation District (the "Historic District"), which includes the National Register listed Buffalo City Hall building, described on Appendix A annexed hereto and incorporated herein by reference; and

WHEREAS, GSA has applied the Criteria of Adverse Effect (36 C.F.R. § 800.5(a)(1)) and finds that the undertaking may have adverse effects on the following properties that are eligible for listing in the National Register:

- 1 The Joseph Ellicott Historic District;
 2. The Erlanger Office Building (Former Erlanger Theater), 120 Delaware Avenue ("Erlanger Building"); and
 3. The Balcom-Chandler House, 91 Niagara Street; and
- WHEREAS, GSA finds that the undertaking may also have adverse effects on archaeological resources yet to be identified within the Site; and

WHEREAS, GSA initiated consultation with the New York State Historic Preservation Office (NYSHPO) on April 5, 2002 and, correcting an oversight in the Section 106 process, reinitiated consultation with the NYSHPO on July 30, 2003 and initiated consultation with the Advisory Council on Historic Preservation ("ACHP") on October 9, 2003 in pursuant to compliance with 36 C.F.R. § 800.13 and Section 106 of the National Historic Preservation Act of 1966, as amended ("NHPA"), 16 U.S.C. § 470f, and its implementing regulations (36 C.F.R. Part 800), to avoid, reduce or mitigate the adverse effects of this undertaking on historic properties; and

WHEREAS, GSA has also consulted with the City of Buffalo, the Buffalo Development Council, the Campaign for Greater Buffalo, the Preservation Coalition of Erie County, the Landmark Society of the Niagara Frontier, Buffalo Place, Inc., and the State University of New York at Buffalo School of Architecture and Planning regarding the undertaking of the project and its potential adverse effects on historic properties; and

WHEREAS, pursuant to 36 C.F.R. § 800.6(c)(3), GSA has (i) invited the City of Buffalo to participate as an Invited Signatory Party, (ii) invited the Buffalo Development Council, the Campaign for Greater Buffalo, the Preservation Coalition of Erie County, the Landmark Society of the Niagara Frontier, Buffalo Place, Inc., and the State University of New York at Buffalo School of Architecture and Planning to participate as Consulting Parties, and (iii) been advised that Buffalo Place, Inc. and the State University of New York at Buffalo School of Architecture and Planning have declined the invitation to execute this Memorandum of Agreement ("Agreement"); and

WHEREAS, GSA completed an Environmental Assessment (Parsons and Associates, August 26, 2002) of potential sites for construction of the Courthouse in accordance with the National Environmental Policy Act of 1969, as amended, and presented its preferred site selection to the SHPO and ACHP on September 16, 2003, and the SHPO and ACHP concurred with the preferred site selection as reflected in the correspondence annexed hereto as Appendix B and incorporated herein by reference; and

WHEREAS, GSA presented to the public, including the SHPO and ACHP, on November 13, 2003, in Buffalo, GSA's preferred site selection, GSA's determination of the potential adverse effects on historic resources in the APE and a description of the proposed design of the Courthouse; and

WHEREAS, GSA presented to the SHPO, ACHP and the City of Buffalo on March 15, 2004, the design for the Site and the Courthouse as depicted in the architectural model, a graphic of which is attached hereto as Appendix C and incorporated herein by reference (the "Architectural Model"); and the SHPO, ACHP and the City of Buffalo (i) acknowledged the design for the main building and the plaza and the SHPO and ACHP further acknowledged that the extensive use of glass was not considered preferable due to the adjacent masonry buildings of the Historic District; and (ii) concurred with GSA's redesign of the entry pavilion in response to SHPO's, ACHP's and the City of Buffalo's recommendations for "completing the Square" by locating the entry pavilion along the Niagara Square street wall.

WHEREAS, GSA has provided an opportunity for public review and comment in the development of this project and will continue to respond to public concerns in accordance with 36 C.F.R. § 800.2(d) and § 800.6(a)(4);

NOW, THEREFORE, GSA, the SHPO, and ACHP (collectively, the "Signatory Parties") agree that, upon GSA's decision to proceed with the construction of the Courthouse, the development of the project shall be implemented in accordance with the following stipulations to take into account the effect of such undertaking on historic properties.

STIPULATIONS

I. EFFECTS OF CONSTRUCTION ON THE HISTORIC DISTRICT

- A. Design. GSA shall cause the Courthouse to be designed in accordance with the recommended approaches set forth in the *Secretary of the Interior's Standards for Rehabilitation and Illustrated Guidelines for Rehabilitating Historic Buildings* (U.S. Department of the Interior, National Park Service, 1992) as depicted in the Architectural Model. GSA will consider revisions to the design and/or material selection of the entry pavilion as proposed by the SHPO and ACHP.
- B. Design Excellence. The Courthouse is being designed pursuant to the principles of the GSA Design Excellence Program and the late Senator Daniel Patrick Moynihan's "Guiding Principles for Federal Architecture." The goal of this program is to produce distinctive public buildings that are part of the nation's legacy and symbolic of its governmental purpose and principles.
- C. Security Guidelines. The Courthouse shall also be designed in accordance with mandated security requirements (ISC Security Criteria, Interagency Security Committee, Vulnerability Assessment of Federal Facilities, U.S. Department of Justice, U.S. Marshals Service).
- D. Design Review. GSA shall provide the SHPO and ACHP an opportunity to review and comment on the design package for the exterior of the proposed Courthouse to ensure its conformity with the design concept depicted in the Architectural Model. The SHPO and ACHP will be afforded thirty (30) calendar days after confirmed receipt of the submitted design, plans and/or specifications (the "Design Documents") for comment. Should the SHPO and/or ACHP respond within the authorized time period, GSA shall take the comments of the SHPO and ACHP into account. GSA shall consult with the SHPO and ACHP to discuss any concerns with regards to the submitted Design Documents. If any such concerns are not resolved through such consultation, GSA shall seek resolution in accordance with Stipulation V of this Agreement. Should the SHPO and ACHP not comment within thirty (30) calendar days after confirmed receipt of the submitted Design Documents, the submitted Design Documents shall be "deemed approved" (meaning, as used in this Agreement, approved without

further action on the part of any party). The SHPO and ACHP shall not comment on any Design Document, or aspect thereof, previously approved in writing or deemed approved as provided above; provided, however, that shall there be major revisions to the project as reflected in the Design Documents then GSA shall present these changes to the SHPO and ACHP for consultation and review in accordance with the provisions of Stipulation I.E., below.

- E. Design Modifications. If, after receiving comments on any Design Documents that have been reviewed and commented on pursuant to this Agreement, GSA desires any material or substantial additions thereto or deletions therefrom, which material or substantial changes, additions and/or deletions affect the Site's layout, landscaping or public amenities or the main building's or entry pavilion's exterior finishes, materials, scale, and/or massing as presented in the previously submitted Design Documents, GSA shall furnish the SHPO and ACHP with a statement of the requested material changes, additions and/or deletions, submitting with such statement appropriate plans, specifications or other documentation showing in detail the nature of the material changes, additions and/or deletions requested. GSA shall provide the SHPO and ACHP with the same review period specified in Section I.D, above, for any such material changes, additions and/or deletions, except in the event of an Emergency Situation. For purposes of this Section, Emergency Situation shall mean a situation immediately impairing or threatening immediately to impair the structural support or integrity of or cause immediate damage to property or causing or threatening to cause immediate injury to a person or persons. As soon as the Emergency Situation has abated, GSA shall afford the SHPO and ACHP a reasonable opportunity (but no more than thirty (30) calendar days) to review and comment upon the Design Documents for any portion of the work that affects the Site's layout, landscaping or public amenities or the main building's or entry pavilion's exterior finishes, materials, scale, and/or massing as presented in the previously submitted Design Documents. Should the SHPO and/or ACHP respond within the authorized time period, GSA shall take the comments of the SHPO and ACHP into account in deciding whether to proceed with the proposed modifications, or re-initiate consultation, if appropriate.
- F. Public Space. The entry pavilion of the new Courthouse shall be designed to accommodate public use with secure displays of educational, artistic and other appropriate installations.
- G. Public Education and Interpretive Materials. GSA shall fund and manage research on the history of downtown Buffalo and detailed research on the social and architectural history of the Joseph Ellicott Historic District. GSA shall consult with appropriate historic preservation and cultural organizations as well as with community organizations and individuals knowledgeable about Buffalo's history. Research will culminate in:

1. Brochure: Made available to requesting parties, educational organizations and cultural groups on a “no cost” basis.
2. Lobby Display: GSA shall fund and manage the design and installation of an exhibition on the Joseph Ellicott Historic District and environs in a permanent gallery space within the Courthouse.
3. Exterior Display: GSA shall fund and manage the design and installation of exterior interpretive panels that depict the history of the area.

Drafts of the research, brochure and graphics shall be submitted to the SHPO and the City of Buffalo for review and comment. The SHPO comments shall be provided within thirty (30) calendar days of receiving the draft submittal. Installation of the lobby display and exterior display and distribution of the brochure shall coincide with dedication of the Courthouse.

Copies of the final brochure shall be provided to the City of Buffalo and the SHPO.

GSA will provide reproducible brochure masters to the City of Buffalo.

Research and interpretive material will include, at a minimum, the following elements:

1. Overview of Buffalo History and Architecture
2. Urban Planning History of Downtown Buffalo
3. History of Joseph Ellicott
4. Significance of the Joseph Ellicott Historic District
5. Architectural Inventory and History of the Joseph Ellicott Historic District properties
6. Significance of Historic Preservation
7. Joseph Ellicott Historic District Design Guidelines
8. Photographs and Graphics

II EFFECTS OF THE UNDERTAKING ON THE ERLANGER BUILDING

A. Recordation. Prior to the demolition of the Erlanger Building, GSA shall photo-document the building in its existing context at 120 Delaware Avenue, Buffalo, New York, in accordance with the U.S. Department of the Interior, National Park Service, Historic American Buildings Survey (“HABS”) guidelines.

1. Photographs: GSA shall prepare three (3) sets of archival, black and white, 8”x10” photographs for the Erlanger Building. The photographs shall depict the following:

- (a) Exterior views of all elevations, aspects and detail views; and
- (b) Site views of the landscape, context and orientation of the Erlanger Building.
- (c) Interior views of main lobby, aspects and detail views.

Original documentation, consisting of historic photographs and original plans, may be discovered through the course of documentation. These documents will be used to supplement documentation.

- B. Distribution of Documents. All documentation shall be completed and delivered to the SHPO and ACHP prior to the demolition of the Erlanger Building and the negatives and one (1) set of archival prints of the photographs and one (1) copy of all other documentation prepared hereunder shall be delivered to the Buffalo and Erie County Public Library, to the Buffalo and Erie County Historical Society, and to the SHPO for submission to the New York State Archives.
- C. Qualifications of Recordation Personnel. All recordation of the Erlanger Building shall be conducted by or under the direct supervision of a person or persons meeting at a minimum the Secretary of the Interior's Professional Qualifications Standards for Architectural History or Architecture (48 F.R. 44739), attached hereto as Appendix D and incorporated herein by reference (the "Professional Qualifications Standards").
- D. Salvage of Materials. After documentation and prior to demolition of the Erlanger Building, GSA shall notify the City of Buffalo and the City of Buffalo shall have a period of thirty (30) calendar days to select architectural elements for curation, public education, and reuse. GSA shall facilitate removal of the selected items to coincide with demolition of the building.

III. EFFECTS OF THE UNDERTAKING ON BALCOM-CHANDLER HOUSE

- A. Recordation. Prior to the relocation or demolition of the Balcom-Chandler House, the building shall be photo-documented in its existing context at 91 Niagara Street, Buffalo, New York, in accordance with the HABS guidelines.
- 2. Photographs: GSA shall prepare three (3) sets of archival, black and white, 8"x10" photographs of the Balcom-Chandler House. The photographs shall depict the following:
 - (a) Exterior views of all elevations, aspects and detail views;
 - (b) Site views of the landscape, context and orientation of the Balcom-Chandler House.

Original documentation, consisting of historic photographs and original plans, may be discovered through the course of documentation. These documents will be used to supplement documentation.

- B. Distribution of Documents. All documentation shall be completed and delivered to the SHPO and ACHP prior to the relocation or demolition of the building and the negatives and one (1) set of archival prints of the photographs and one (1) copy of all other documentation hereunder shall be delivered to the Buffalo and Erie County Public Library, to the Buffalo and Erie County Historical Society, and to the SHPO for submission to the New York State Archives.
- C. Qualifications of Recordation Personnel. All recordation of the Balcom-Chandler House shall be conducted by or under the direct supervision of a person or persons meeting at a minimum the Secretary of the Interior's Professional Qualifications Standards.
- D. Offer of Conveyance. Prior to the demolition of the Balcom-Chandler House, GSA shall notify State and local public agencies and the public of the availability of the building. If no State or local agency expresses an interest in acquiring and moving the building from the Site within thirty (30) calendar days from the notice of availability, GSA shall advertise and solicit proposals for a period of thirty (30) calendar days offering to enter into a contract of sale for the Balcom-Chandler House for nominal consideration with any interested party that presents a feasible plan for moving and restoring the building. GSA shall provide interested parties with copies of all engineering studies and other documents, which will enable such parties to reasonably estimate the cost and feasibility of moving the building. The Signatory Parties will determine the feasibility of proposals within thirty (30) calendar days of receipt. In the event that the Balcom-Chandler House is not disposed of in this manner, GSA shall be responsible for demolishing the building after documentation has been completed and accepted by the SHPO and ACHP.

IV. ARCHAEOLOGY

- A. Preconstruction Compliance. Prior to commencing with construction of the Courthouse, GSA shall conduct an archeological Phase IA and archeological Phase 1B survey of the Site in a manner consistent with the Secretary of the Interior's Standards and Guidelines for Identification, 48 F.R. 44720-23, and that takes into account the recommended approaches described in the National Park Service publication The Archaeological Survey: Methods and Uses, 1978: NTIS order No. PB284061. The survey shall be conducted in consultation with the SHPO and a report of the survey shall be submitted to the SHPO for review and comment within thirty (30) calendar days of receipt.
- B. Evaluation.

- 1 The studies completed pursuant to Stipulation IV.A shall demonstrate a

level of effort consistent with 36 C.F.R. § 800.4(b)(1) and provide GSA with the information to determine which archeological resources are eligible for inclusion in the National Register in accordance with 36 C.F.R. § 800.4(c). GSA shall acknowledge and seek the special expertise of Indian Tribes, if applicable, in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

2. If GSA determines any of the National Register criteria are met and the SHPO agrees, the archeological resource shall be considered eligible for the National Register and treated in accordance with the Stipulation IV.D.
3. If GSA and the SHPO do not agree on National Register eligibility, GSA shall seek a formal determination of eligibility from the Keeper of the National Register.
4. If GSA and the SHPO agree that the archeological resource is not eligible for the National Register, then no further action is necessary under the terms of this MOA, unless there is a written objection submitted in accordance with Stipulations IV.B.5 and IV.B.6.
5. GSA shall notify any applicable Indian Tribes, and other parties who so request, of its findings regarding eligibility.
6. If a party, who has been so notified, objects in writing within thirty (30) calendar days to GSA's determination of eligibility, even though GSA and the SHPO may agree, GSA shall consult with the SHPO, Indian Tribes, and the objecting party in accordance with 36 C.F.R. § 800.4(c)(2), and review any evidence brought forward prior to making a decision.

C. Assessment of Effects.

1. In consultation with the SHPO, Indian Tribes when appropriate, and other parties deemed appropriate by GSA, GSA shall determine if the project will adversely effect archeological resources determined eligible for inclusion in the National Register pursuant to 36 C.F.R. § 800.5.
2. If GSA determines the project will adversely affect eligible archeological resources, GSA shall make reasonable efforts to avoid or minimize the adverse effects. If, in consultation with the SHPO, Indian Tribes when appropriate, and other parties deemed appropriate by GSA, GSA determines it is not possible to avoid disturbance, then GSA shall treat the archeological resource in accordance with Stipulation IV.D.
3. Any dispute regarding the determination of effects of eligibility shall be resolved in accordance with Stipulation V.

D. Protection.

- 1 In accordance with 36 C.F.R. § 800.13, GSA will provide for the protection, evaluation, treatment, and mitigation of any historic property discovered prior to or during construction. GSA will use an individual who meets, at a minimum, the professional qualification standards in archeology set forth in the Secretary of the Interior's Professional Qualification Standards to monitor all ground disturbing activities. Should a discovery occur, GSA will notify the SHPO and ACHP within two (2) calendar days in accordance with 36 C.F.R. § 800.13 to develop an appropriate treatment plan ("Treatment Plan") prior to resuming construction operations in the vicinity of the discovery.
- 2 The implementation of the Treatment Plan must be completed prior to the commencement of any construction activities within a segment that could affect that site. The Treatment Plan(s) shall specify at a minimum:
 - a. Description of the historic properties or portions of historic properties where treatment will be carried out;
 - b. Description of any historic property or portion thereof that will be adversely effected without treatment for such action;
 - c. Methods for site preservation/protection;
 - d. Research questions to be addressed through data recovery with a clear and explicit discussion of their scientific justification and an explanation of their relevance and importance;
 - e. Methodology in data analysis, data management and dissemination of data, including schedule;
 - f. Plans for curation of recovered materials and records;
 - g. Provisions for reburial of human remains and grave goods where appropriate, including timeframes for analysis and reburial;
 - h. Plans for public education and interpretation;
 - i. Plans for keeping the SHPO, Indian Tribes, and other appropriate parties informed of work progress and findings; and
 - j. A schedule for the submission of reports and deliverables.
- 3 GSA shall provide the SHPO, ACHP, Indian Tribes who have expressed interest in the Site, and other parties deemed appropriate by GSA, thirty (30) calendar days to review and provide comments on the Treatment Plan(s)

developed in accordance with Stipulation IV.D. The final Treatment Plan(s) developed by GSA shall take into account comments received. GSA may provide other consulting parties, as appropriate, an opportunity to review and comment on the proposed Treatment Plans(s). If no response is received within thirty (30) calendar days of confirmed receipt, GSA may proceed with the proposed Treatment Plan.

4. Any disputes regarding the Treatment Plan(s) shall be resolved in accordance with Stipulation V.
- E. Discovery of Human Remains. In the case of discovery of human remains on GSA lands during construction activities, GSA will notify the SHPO, ACHP and Native American Tribes(s) or other ethnic group(s) related to the burial, and consult with them concerning the treatment of remains consistent with 43 C.F.R. § 10. All work will cease in the vicinity and archaeologists will immediately notify GSA officials. Every effort will be made to avoid further disturbance of the remains. Where avoidance is not possible, burials will be removed prior to further construction activities and re-interred or otherwise treated as agreed by GSA and the affected Tribe(s) in conformance with the Native American Graves Protection and Repatriation Act, or as otherwise agreed by GSA and the affected ethnic group(s).

V. DISPUTE RESOLUTION

- A. Should any of the Signatory Parties object in writing to GSA regarding any action proposed to be carried out with respect to the undertaking or implementation of this Agreement, GSA shall consult with the objecting party to resolve the objection. If, after initiating such consultation, GSA determines that the objection cannot be resolved through consultation, GSA shall forward all documentation relevant to the dispute to ACHP, including GSA's proposed response to the objection. Within thirty (30) calendar days after receipt of all pertinent documentation, ACHP shall exercise one of the following options:
- 1 Consult with the objecting party, and with the other parties as appropriate to resolve the dispute;
 - 2 Provide GSA with recommendations, which GSA shall take into account in reaching a final decision regarding the dispute; or
 - 3 Notify GSA that the dispute will be referred for comment pursuant to 36 C.F.R. § 800.7 (a)(4) and proceed to refer the dispute for comment. GSA shall take the resulting comment into account in accordance with 36 C.F.R. § 800.7 (c)(4) and Section 110(l) of the NHPA.
- B. Should ACHP not exercise one of the above options within thirty (30) calendar days after receipt of all pertinent documentation, GSA may assume ACHP's

concurrence with GSA in its proposed response to the objection.

C. GSA shall take into account any ACHP recommendation or comment provided in accordance with this Stipulation with reference only to the subject of the dispute; GSA's responsibility to carry out all actions under this Agreement that are not the subject of the objection shall remain unchanged and in full force and effect.

VI. AMENDMENT AND TERMINATION

A. Any Signatory Party may request that this Agreement be amended, whereupon the parties to this Agreement will consult in accordance with 36 C.F.R. § 800.6 (c)(7).

B. Any Signatory Party may terminate this Agreement by providing thirty (30) calendar days advance written notice to the other Signatory Parties, provided that the Signatory Parties consult during the thirty (30) calendar day notice period to seek agreement on amendments or other actions that would avoid termination. In the event of termination, GSA will comply with 36 C.F.R. § 800.3 through 800.7(c)(3), with regard to individual actions covered by this Agreement.

VII. COUNTERPARTS

This Agreement may be executed in multiple original counterparts, each of which shall be deemed to be an original, and which together constitute one and the same instrument.

Execution of this Agreement and implementation of its terms evidences that GSA has afforded the SHPO, ACHP, the City of Buffalo, and the other Consulting Parties a reasonable opportunity to comment on GSA's proposed construction of the Courthouse and its effects on historic properties, and that GSA has taken into account the effects of its undertaking on historic properties and is in full compliance with Section 106 of the NHPA and its implementing regulations.

SIGNATORY PARTIES

UNITED STATES GENERAL SERVICES ADMINISTRATION

Signed by: _____ Date: _____
Printed Name: Eileen Long-Chelales
Title: Regional Administrator

NEW YORK STATE HISTORIC PRESERVATION OFFICE

U.S. Courthouse, Buffalo: Memorandum of Agreement
June 2, 2004

Signed by: _____ Date: _____
Printed Name: Bernadette Castro
Title: State Historic Preservation Officer

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Signed by: John M. Fowler Date: 6/18/04
Printed Name: John M. Fowler
Title: Executive Director

INVITED SIGNATORY PARTY

CITY OF BUFFALO

Signed by: _____ Date: _____
Printed Name: Honorable, Anthony Masiello
Title: Mayor-Buffalo, NY

CONSULTING PARTIES

Agency: _____

Signed by: _____ Date: _____
Printed Name: _____
Title: _____

Agency: _____

Signed by: _____ Date: _____
Printed Name: _____
Title: _____

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